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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1997

JAMES C. BARNES, JR.
Petitioner,

VERSUS

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner, James C. Barnes, Jr., requests this Court to consider four questions, as follows:

1) Whether a negligent misrepresentation claim by a seaman against the United States Coast Guard is supported by admiralty tort jurisdiction so as to allow the mariner to invoke a maritime remedy against the United States under the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*

2) Whether the decisions of the United States Court of Appeals for the Fifth Circuit and the Ninth Circuit in *Kuehne & Nagel v. Geosource, Inc.*, 874 F.2d 283 (5th Cir. 1989) and *J. Lauritzen A/S v. Dashwood Shipping, Ltd.*, 65 F.3d 139 (9th Cir. 1995) are in conflict with the standard used by the United States Court of Appeals for the First Circuit in *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4 (1st Cir. 1975) for establishing admiralty tort jurisdiction in that the First Circuit recognizes as "impact on navigable waters" test to establish maritime locality whereas the Fifth and Ninth Circuits do not.

3) Whether tort actions involving the issuance of a mariner's license are intrinsically maritime such that admiralty jurisdiction should be found regardless of the locality of the tort.

QUESTIONS PRESENTED FOR REVIEW (continued)

4) Whether the Court should overrule the requirement that a maritime tort take place on navigable waters where, as here, the tort exhibits not only a substantial connection to traditional maritime activity but in fact the relationship to such activity is compelling.

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THE OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued a summary opinion on September 17, 1997 being No. 97-30384, on its docket. (Appendix "A"). The matter was an appeal from the United States District Court for the Eastern District of Louisiana. The District Court had entered a judgment against petitioner in Civil Action No. 96-1764, Section "I" on April 2, 1997 (Appendix "B"). The District Court issued an order and reasons on March 26, 1997 (Appendix "C").

BASIS OF JUSISDICTION

The jurisdiction of this Honorable Court to consider the decision of the Court below, issued by the United States Court of Apeals for the Fifth Circuit on September 17, 1997, is premised upon 28 U.S.C. 1254(1).

STATUTORY PROVISION

Petitioner's claim is grounded upon the Suits in Admiralty Act, 46 U.S.C. § 741 and 742, reprinted at Appendix "D".

ARGUMENT

Factual Background

James C. Barnes, Jr. is a master mariner who has uneventfully plied his trade on navigable waters for the better part of his working life. Mr. Barnes' career has been spotless and long-standing. Except for the incident in suit, which he contends was caused by actionable Coast Guard negligence, he has always timely renewed his various Coast Guard licenses.[1]

Petitioner first obtained a Coast Guard license to operate passenger-carrying vessels of not more than 100 gross tons upon the Gulf of Mexico on January 28, 1975. It was renewed on February 1, 1980.

The Coast Guard issued a second license to petitioner on February 6, 1987 authorizing him to operate vessels of not more than 300 gross tons in the Gulf of Mexico while engaged in the oil and mineral industry. When he obtained the 300-ton "oil and mineral" license, Mr. Barnes did not cancel the previously issued 100-ton license.

Mr. Barnes' difficulties with the Coast Guard began on February 16, 1990, when he duly applied for renewal of his 100-ton operator's license at the Coast Guard's New Orleans office. Mr. Barnes was at that time advised by Coast Guard personnel that his 300-ton license (which was scheduled to expire in 1992) encompassed the authority of his 100-ton operator's license. He was told that the Coast Guard would endorse his 300-ton oil and mineral license to allow him to operate as a master of near coastal steam and motor vessels

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[1] Coast Guard licenses of the type involved here have five-year terms.

of not more than 500 gross tons pursuant to new Coast Guard regulations effective in December of 1997. He agreed to the proposed endorsement. Mr. Barnes' 300-ton "oil and mineral" license was accordingly endorsed on February 20, 1990 to allow him to operate as a master of coastal and steam vessels of not more than 500 gross tons. The 100-ton license which he originally intended to renew on February 16, 1990 was cancelled.

At the time the 500-ton endorsement was issued to him, the Coast Guard licensing officer told him that it would allow him to operate vessels for a term of five years from its effective date, i.e., from February 20, 1990 until February 20, 1995. Accordingly, petitioner was under the good faith impression created by Coast Guard assurances that renewal of the 500-ton license would not be required until February 20, 1995. He therefore sought renewal of his license on December 28, 1994, two months before he believed it was due to expire.

Upon Barnes' application for renewal of his license, he was advised by the Coast Guard that the original date of issue of the 300-ton license (February 6, 1987) controlled the matter. Because it had expired more than two years before, the Coast Guard maintained that Mr. Barnes had been illegally operating vessels pursuant to an expired license.[2]

Mr. Barnes' arguments that it had been represented to him that the 500-ton endorsement would be effective for five years, and that he had relied to his detriment on such

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[2] In a related proceeding involving action against Mr. Barnes' employer for having hired an unlicensed master, a Coast Guard official noted that Mr. Barnes' should have been issued a 5 year license instead of an endorsement.

advice, were ignored. The Coast Guard charged him with operating vessels without an appropriate license. Instead of formally proceeding against his license, the Coast Guard on February 15, 1995 relented, issuing a warning which became a part of his permanent Coast Guard record.

Petitioner's expired 500-ton license was canceled by the Coast Guard. Because the Coast Guard had also previously canceled his 100-ton license when he sought its renewal in February 1990, Mr. Barnes was in the unenviable position for a seaman of holding no valid Coast Guard licenses. He was therefore unable to work as a master of vessels.

Petitioner was forced to undergo re-testing to regain his license which would have otherwise been routinely renewed. The re-testing took several months to complete during which he was unemployed. Damages were sustained as a result.

Mr. Barnes has renewed his various Coast Guard licenses like clockwork. It was not until the Coast Guard instituted new licensing regulations in December of 1987, and he received improper and negligent advice from the Coast Guard in February of 1990, that he encountered problems. Mr. Barnes maintains that the Coast Guard negligently misrepresented to him the length of time during which the 500-ton endorsement to his license would be valid, thereby committing a maritime tort which is cognizable in admiralty under the Suits in Admiralty Act.[3]

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[3] The Fifth Circuit recognizes negligent misrepresentation as a maritime tort. *DeBardeleben Marine Corp. v. U.S.*, 451 F.2d 140 (5th Cir. 1971).

Argument

This matter has important jurisdictional implications far beyond those pertinent solely to Mr. Barnes. It presents the Court an opportunity to reconcile the standard used, on the one hand, by the First Circuit and, on the other, by the Fifth and Ninth Circuits in dealing with claims in which the operative facts have a distinct maritime flavor and a substantial impact on navigable waters, but do not have a traditional maritime locale. Moreover, the Court may use this matter as a vehicle to emphasize its previous holdings that the relationship of the tort to traditional maritime activity should carry significantly more jurisdictional weight than a formulaic application of the locality test. Finally, petitioner believes that his case, involving as it does the licensing of seamen, is the kind of case which, regardless of the place where the tort occurs, is intrinsically maritime.

The Conflict Between the Fifth and Ninth Circuits and the First Circuit

The United States has waived sovereign immunity as respects maritime claims which would fall under the Courts' general admiralty jurisdiction "if a private person or property were involved." 46 U.S.C. 742. A maritime locale and a connection to traditional maritime activity are required in order to find that admiralty tort jurisdiction exists so as to support an action under the Suits in Admiralty Act. *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). In this case, the Courts below have held that no maritime locale (*situs*) was involved in petitioner's action. Accordingly, his Suits in Admiralty Act action was dismissed for lack of admiralty jurisdiction.

In his appeal to the Fifth Circuit, petitioner relied on a Fifth Circuit case, *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283 (5th Cir. 1989) and on a First Circuit case, *Carroll v. Protection Maritime Insurance Co.*, 512 F.2d 4 (1st Cir. 1975). Petitioner maintained that each of those cases supported his argument that maritime jurisdiction existed to allow his Suits in Admiralty Act action to go forward.

The Fifth Circuit Court of Appeals disagreed, holding that *Kuehne & Nagel* did not support petitioner's tort claim because, as was the case in *Kuehne & Nagle* the injury sustained by Mr. Barnes was "too remote from the tortious act to meet the *situs* requirement for admiralty jurisiction." Appendix "A", p. 5.

The Fifth Circuit declined to follow the First Circuit's decision in *Carroll* on the ground that the jurisdictional analysis made by the First Circuit was not its law. Moreover, the Fifth Circuit noted that in *Kuehne & Nagel* it had previously refused to follow *Carroll*. The Fifth Circuit also noted that the Ninth Circuit had declined to follow *Carroll* in *J. Lauritzen A/S v. Dashwood Shipping, Limited*, 65 F.3d 139, 143 (9th Cir. 1995) in which *Carroll* was described by the Ninth Circuit as a minority view. Whether the Ninth Circuit's comment in *Dashwood* that *Carroll* is a minority view is open to question in view of the Second Circuit's decision in *Khedival Line, S.A.E. v. Seafarers' International Union*, 278 F.2d 49, 52 (2d Cir.1960) in which the Second Circuit stated that a striking union's actions on land to prevent discharge of a vessel could be considered a

maritime tort because of the impact on the navigable waters of the affected port. The Second Circuit has also described locality as being important but "...not necessarily determinative...", *Transatlantic Marine v. Ace Shipping*, 109 F.3d 105, 109 (2d Cir. 1997). Accordingly, the Second Circuit may be aligned with the First Circuit's position in *Carroll* and therefore also be in conflict with the Fifth and Ninth Circuits.

Petitioner maintains that *Carroll* was misinterpreted by both the Fifth and the Ninth Circuits as they both failed to recognize that *Carroll* involved the foreclosing of seagoing relationships. *Carroll* involved seamen's claims against an insurer that had effectively blacklisted them from working aboard vessels by refusing to provide insurance coverage to employers who hired them for work on their vessels. As noted in *Carroll* the disruption or foreclosing of the seamen's seagoing relationship resulted in an impact which was of necessity maritime in nature. As was the case here, the locality of the act was irrelevant to the harm done. *Carroll v. Protection Maritime Insurance Co., Limited*, 512 F.2d 4, 7 (1st Cir. 1975). The Court in *Carroll* engaged in a detailed and convincing discussion of the instances in which the courts have found maritime tort jurisdiction based upon the nature of the activity despite no clear finding of *situs*.

A conflict between the First and Fifth (and Ninth) Circuits therefore exists in the manner in which those Courts approach the *situs* analysis for purposes of establishing maritime tort jurisdiction. The Fifth and Ninth Circuits do not recognize the "impact on navigable waters" analysis used by the First Circuit in establishing *situs*. It appears clear

that if this case had arisen in the First Circuit, Mr. Barnes would have been allowed to proceed with his action. See *Miller v. Penobscot Bay Medical Associates*, 836 F. Supp. 31 (D. Me., 1993) in which the Maine District Court found *situs* in a claim by a seaman against a physician. It was alleged in *Miller* that the physician's land-based erroneous medical reports resulted in the termination of the seaman's employment.

In *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the landmark *situs* case, this Court recognized that maritime jurisdiction has been found in cases where the tort has no clear-cut maritime *situs* but in which the tortious act bears a significant relationship to traditional maritime activity. The Court in *Executive Jet Aviation* noted that it has never completely foreclosed a finding of maritime tort jurisdiction where the *situs* portion of the test is completely absent or cannot be analyzed traditionally, stating that:

> "Apart from the difficulties involved in trying to apply the locality rule as the sole test of admiralty tort jurisdiction, another indictment of that test is to be found in the number of times the federal courts and the Congress, in the interest of justice, have had to create exceptions to it in the converse situation — i.e., where the tort has no maritime locality but does bear a relationship to maritime service, commerce, or navigation." [Citations omitted]. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 259 (1972).

This is exactly the case here. The court noted in *Executive Jet Aviation* that maintenance and cure is routinely awarded seamen who are injured on land; that the doctrine of

unseaworthiness has been extended to permit a seaman to recover for injuries sustained wholly on land caused by a defect in the ship or its gear; and that Congress has extended admiralty jurisdiction landward by its enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740.[4]

The Court in *Executive Jet Aviation* concluded its analysis of these land-based maritime torts by stating the following:

> "In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 261 (1972).

In *Executive Jet Aviation*, a private jet crashed on navigable waters. It was alleged that because *situs* was present, the matter was ruled by maritime law. The Court disagreed, rejecting a mechanical application of the *situs* test in favor of a more pragmatic test. As noted above, however, this Court recognized that maritime tort jurisdiction can and has been found in the absence of *situs*. In *Executive Jet Aviation*, the Court held that *situs* was required but emphasized the importance of a finding that the activity in question bear a substantial relationship of traditional maritime activity.

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[4] Land-based maritime torts involving products liability claims, *Sperry Rand Corp. v. RCA*, 618 F.2d 319 (5th Cir. 1980); negligent licensing by the Coast Guard, *American Global Lines v. U.S.*, 645 F.Supp. 783 (S.D.N.Y, 1986); and negligent cartography, *Hyundai Merchant Marine Co., Ltd. V. U.S.*, 888 F.Supp 543 (S.D.N.Y., 1995), could be added to the Court's list of "no *situs*" maritime tort cases listed in *Executive Jet Aviation*.

The Court of Appeals for the Fifth Circuit in this case unfortunately ignored *Executive Jet Aviation's* proscription that the locality test should never be mechanically applied, particularly where the connection to traditional maritime activity is as substantial, certain and compelling as it is here.

Cases Involving Seamen's Employment as such Should be Considered Always Maritime Regardless of Situs

In *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886 (1961), this Court alluded to scholarly commentry concerning early sources of maritime law which held that maritime law always applies in all cases involving seamen.[5] The *Kossick* Court's footnote is instructive. Maritime law should recognize that disputes involving seamen in their capacity as such, *or in their licensing*, must always be ruled by maritime law because not only is licensing an important maritime activity but because, in this age, it generally does not and cannot take place on navigable waters. To deny a seaman a right of action under these circumstances is to elevate form over substance. Petitioner therefore suggests that this Court should issue a writ in this case or summarily reverse if only to hold that maritime jurisdiction always exists over tort claims involving a seaman's licensing and employment.

Because all of the First Circuit cases deal with seaman's employment claims, a ruling holding such claims are always maritime would have the added benefit of reconciling the conflict between the Circuits without the need to

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[5] "Benedict goes on to quote from an anonymous commentary on the Medieval Statutes of Culm, one of the early sources of maritime law, that anything pertaining to navigation or seamen is to be considered a part of the maritime law." *Kossick v. United Fruit Co.*, 365 U.S. 731, 736, n. 5 (1961).

engage in a major re-examination of the *situs* requirement.

Maritime Situs was Established

Petitioner was precluded as a result of the Coast Guard's wrongful actions from working in his calling as a mariner on navigable waters. Consequently, the requirement that a plaintiff be damaged on navigable waters as a result of the tort was fulfilled. This case is therefore no different from the plethora of maritime tort cases in which a plaintiff sustains damages on land for injuries related to maritime employment which occur on navigable waters.

In the alternative, maritime *situs* sufficient to support maritime tort jurisdiction is present because the navigational activity performed by petitioner while holding an expired license indisputably took place on navigable waters. Plaintiff's administrative liability to the Coast Guard for operating vessels illegally and, consequently, the potential for loss of his license, materialized when he innocently worked on navigable waters in violation of Coast Guard licensing regulations. The Coast Guard's negligent misrepresentations led to his violation of Coast Guard regulations on a maritime *situs*. Petitioner's unlwful operation of vessels on navigable waters fulfills the maritime *situs* requirement because the detrimental reliance element of the tort of negligent misrepresentation took place on a maritime locale. If plaintiff had not used his expired license on navigable waters, the Coast Guard would have committed no tort. Petitioner submits that his use of an expired license on navigable waters was sufficient to establish a maritime *situs* pursuant to *Executive Jet Aviation* .

CONCLUSION

In *Executive Jet Aviation*, this Court quoted from the first edition of G. Gilmore & C. Black, *The Law of Admiralty*, for the proposition that:

> "...borderline cases on jurisdiction could exercise a perverse fascination in the occasion they afford for elaborate casuistry,..." *Executive Jet*, 409 U.S. 249, 254, quoting *The Law of Admiralty* 24 n. 88 (1957).

However, the Court noted that it is the "perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort jurisdiction." *Id.*

While this case appears at first blush to be such a borderline case insofar as *situs* is concerned, *Executive Jet Aviation* specifically rejected a mechanical application of the *situs* test in favor of increased and often exclusive emphasis on the nature and purpose of the maritime activity under jurisdictional analysis. The Fifth Circuit's holding that Mr. Barnes' injury occurred on land, thereby preventing the tort from being recognized in admiralty, was misplaced. Such a view not only fails to distinguish the injury from the damages flowing from it but also ignores *Executive Jet Aviation*'s holding that the connection of the act to traditional maritime activity be given significantly more jurisdictional importance than a formulaic application of the *situs* test.

The licensing of mariners by the sovereign is clearly the kind of traditional maritime activity which supports the exercise of maritime jurisdiction regardless of where it takes place. The Court is urged to recognize this simple and obvious point.

Respectfully submitted:

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CERTIFICATE OF SERVICE

Petitioner, James C. Barnes, Jr., through undersigned counsel, certifies that service of the foregoing Petition for Writ of Certiorari has been made upon the following:

1) The Solicitor General of the United States
Room 5614, Department of Justice
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2) Frederick W. Tucher
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Service was accomplished by mailing a copy of the Petition for Writ of Certiorari to each person noted above on this 16th day of December, 1997, by first class mail, postage prepaid.

RANDALL L. KLEINMAN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-30384
Summary Calendar

FILED
SEP 17 1997

JAMES C. BARNES, JR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERIC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana
(96-CV-1764-1)

Before REAVLEY, KING and DAVIS, Circuit Judges.

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* Pursuant to 5th CIR, R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

James Barnes appeals the dismissal of his suit against the United States brought under the Suits in Admiralty Act (SAA)[1] and the Federal Tort Claims Act (FTCA).[2] The district court dismissed the suit for lack of jurisdiction. We affirm.

In 1987 the Coast Guard issued Barnes a five-year license to operate a vessel of up to 300 tons. In 1990, the license was upgraded or "endorsed" to allow him to operate vessels of up to 500 tons. Barnes believed that the 1990 endorsement gave him a license with a term of five years running from the date of the endorsement, so at the end of 1994 he applied for routine renewal of his license. The Coast Guard explained that the license had expired in 1992, charged him in an administrative proceeding with operating without a license, and eventually issued him a warning.

Barnes claims that the Coast Guard negligently failed to follow its own regulations and renew his license, and negligently misrepresented to him that the 500-ton license had a five-year term running from the date of the 1990 endorsement. As a result of this alleged negligence, Barnes was, according to his complaint, forced to reapply for a license, "a process which required approximately a year of study and testing. During this period of time, he was for all practical purposes unemployed."

The district court properly dismissed the FTCA claim because no formal rejection was received from the Coast

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[1] 46 U.S.C. §§ 741-52.

[2] 28 U.S.C. §§ 1346 (b), 2671-2680.

Guard and Barnes did not wait the full six months, after the filing of his claim, to file suit in federal court under the FTCA, as that Act requires.[3] The district court therefore lacked jurisdiction to hear the claim.[4]

The remaining question is whether the district court had admiralty jurisdiction over the SAA claim. As we have explained, the SAA does not create any new substantive rights.[5] By its terms it allows suit against the United States where "a proceeding in admiralty could be maintained" against a private party.[6] Hence, it waives sovereign immunity of the United States for claims that are otherwise within the admiralty jurisdiction of the federal courts. Stated another way, it "merely provides a jurisdictional hook upon which to hang a traditional admiralty claim. . . . [I]f appellant's claims are ones which would fall under general admiralty jurisdiction 'if a private person or property were involved' then, by way of (the SAA), the United States has waived sovereign immunity as to those claims."[7]

This case falls within the federal district court's admiralty jurisdiction if a two-part test is met. "[T]he court's admiralty jurisdiction will attach in tort cases if the alleged

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[3] See 28 U.S.C. § 2675(a); *Gregory v. Mitchell*, 634 F.2d 199, 203-04 (5th Cir. 1981).

[4] *Id.*

[5] *E.g., Martin v. Miller*, 65 F.3d 434, 438 (5th Cir. 1995).

[6] 46 U.S.C. § 742.

[7] *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 444-45 (5th Cir. 1982) (quoting 46 U.S.C. § 742).

wrong occurs on navigable waters (situs)*and* bears a significant relationship to traditional maritime activity (nexus)."[8] The Supreme Court has described the first component of the two-part test — the situs or locality test — as calling on the court to "determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water."[9]

We agree with the district court that the situs test is not met. The alleged wrongful conduct and consequences of that conduct occurred on land. The processing of Barnes' license applications was a land-based activity. Barnes conceded that the Coast Guard's alleged negligent misrepresentation took place on land. The injuries Barnes suffered — loss of income, unemployment, administrative proceedings and warning from the Coast Guard, and retesting and reapplication for a new license — were essentially land-based as well.

We have recognized that land-based activities which "directly produced a major injury on navigable waters," as where a gun was fired on land and injured a plaintiff on a vessel, can confer admiralty jurisdiction.[10] Again, however, we agree with the district court that the injury here cannot fairly be described as occurring on navigable waters. The injury, if any, was imposed on land, and some consequences followed while plaintiff intended to be afloat.

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[8] *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 288 (5th Cir. 1989) (emphasis in original); see also Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972).

[9] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

[10] *Kuehne & Nagel*, 874 F. 2d at 289.

The most analogous Fifth Circuit case we find in *Kuehne & Nagel.* Plaintiff Kuehne & Nagel contracted with an affiliate of defendant Geosource to transport cargo on land and sea from Europe to the Middle East. When the cargo could not be unloaded in Turkey as planned, Kuehne & Nagel sued Geosource, claiming that Geosource had fraudulently induced Kuehne & Nagel to contract with its affiliate, and claiming damages consisting of the costs of making alternative arrangements to transport the cargo. We concluded that "the injury, if any, that occurred on navigable waters was too remote from the tortious act to meet the situs requirement for admiralty jurisdiction," reasoning that the alleged misrepresentations inducing the contracts had occurred on land and that "the misrepresentations had their desired 'effect' on land when they prompted Kuehne & Nagel to sign the contracts of affreightment."[11] The facts of our case are of course quite different, but employing similar reasoning, the alleged misrepresentation occurred on land, and the effect of the alleged misrepresentation occurred on land as well, when Barnes did not apply for a renewal of his license in 1992 and was forced to secure a new license.

Barnes cites us to *Carroll v. Protection Maritime Ins. Co.*[12] In that case the plaintiffs, seamen and fishermen, had brought personal injury claims and claimed the defendant insurance companies had then tortiously interfered with plaintiffs' contractual and advantageous business relations, by notifying vessel owners that the insurers would not insure the plaintiffs or would only insure them at high premiums. The plaintiffs claimed that as a result of this "blacklisting"

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[11] *Id.*

[12] 512 F.2d 4 (1st Cir. 1975).

they were terminated from their jobs and could not obtain new jobs. The First Circuit held that the tortious interference claims were within the district court's admiralty jurisdiction. It reasoned that the impact of the defendants' actions "was felt in the operations of the affected vessels at sea," and that "[t]he tort alleged in this case seems to us so interwoven with present and potential maritime contractual relationships — traditional concerns of admiralty — as to fall within that jurisdiction."[13] The court described its ruling as recognizing an "exception to the locality test."[14]

Whether or not Carroll is distinguishable on its facts, it is not the law of this circuit. *Kuehne & Nagel* declined to follow *Carroll*, and disagreed with *Carroll* to the extent it holds that "a party is a contract with strong maritime implications" need not also "satisfy *Executive Jet's* situs requirement when seeking to predicate jurisdiction on a maritime tort."[15]

AFFIRMED.

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[13] *Id.* at 8.9.

[14] *Id.* at 9.

[15] *Kuehne & Nagel*, 874 F.2d at 289. *See also J. Lauritzen A/S v. Dashwood Shipping, Ltd.*, 65 F.3d 139, 143 (9th Cir. 1995) (following *Kuehne & Nagel*, declining to follow *Carroll*, and describing *Carroll* as against the great weight of case law.)

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES C. BARNES, JR.	CIVIL ACTION
VERSUS	NO. 96-1764
UNITED STATES OF AMERICA	SECTION "I" (1)

FILED
APR 2 '97

JUDGMENT

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of defendant the United States of America and against plaintiff James C. Barnes, Jr. without prejudice as to the plaintiff's claim under the Federal Tort Claims Act, and with prejudice as to the plaintiff's claim under the Suits in Admiralty Act.

New Orleans, Louisiana this 2d day of April, 1997.

s/s Henry A. Mintz
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY APR 02 1997

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES C. BARNES, JR.	CIVIL ACTION
VERSUS	NO. 96-1764
UNITED STATES OF AMERICA	SECTION "I" (1)

FILED
MAR 26 1997

ORDER AND REASONS

The court addresses herein the defendant's motion to dismiss the plaintiff's suit for lack of jurisdiction and for failure to state a claim.

Plaintiff, James C. Barnes, Jr., filed this suit against the United States alleging that the United States Coast Guard was negligent in the manner in which it handled his licensing to operate vessels in connection with its transition to a new licensing system. Specifically, Barnes alleges that: 1) the Coast Guard negligently misrepresented to him the term of his license to operate vessels; and (2) negligently failed to follow its own regulations and policies for properly converting his licenses (a 100 ton and a 300 ton license) to the new licensing system.

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Barnes alleges that as a result of the Coast Guard's negligence, his 300 ton (endorsed to 500 ton) license expired without his knowledge,[1] he was issued a warning for operating a vessel without a license, and he was unable to work for several months while undergoing re-testing for his license.

Admiralty Jurisdiction

Barnes asserts jurisdiction under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (SAA), and alternatively, under the Federal Tort Claim Act, 28 U.S.C. §§ 1346(b), 2671-2680 (FTCA). The two Acts are mutually exclusive for jurisdictional purposes. *See* 46 U.S.C. § 745 and 28 U.S.C., § 2680(d).

Jurisdiction under the SAA depends on whether the claim is maritime in nature. In order for a claim to be maritime in nature, the "wrong and injury complained of must have been committed wholly upon the high seas or navigable waters" (maritime locality), and the wrong must "bear a significant relationship to traditional maritime activity" (maritime nexus). *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253, 93 S.Ct. 493, 497, 34 L.Ed.2d 454 (1972).

Barnes' claims fail to meet the maritime locality test. It is clear that the negligence in this case occurred entirely on land. While it is true that negligence occurring on land does not necessarily preclude admiralty jurisdiction, there

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[1] The Coast Guard canceled Barnes' 100 ton license because it no longer existed under the new system. Under the new system, the authority of the 100 ton license was encompassed within the 300 ton license.

must be a direct and major manifestation or impact occurring on navigable waters. *See Kuehne & Nagel v. Geosource, Inc.*, 874 F.2d 283, 288-89 (5th Cir. 1989); *Parker v. Gulf City Fisheries, Inc.*, 803 F.2d 828, 828-29 (5th Cir. 1986). In this case, the effects of the Coast Guard's alleged negligence on the plaintiff (warning, loss of license, unemployment, re-testing) occurred entirely on land. The fact that Barnes was unable to operate vessels during the re-testing period does not locate his injury on navigable waters. *See Miller v. Griffin-Alexander Drilling Co.*, 685 F.Supp. 960, 963 (W.D. La. 1988), *aff'd*, 873 F.2d 809 (5th Cir. 1989) (district court declined "to locate plaintiff's injury upon navigable waters merely from the fact that plaintiff may never return to work as a seaman").

This case is unlike *Carroll v. Protection Maritime Ins. Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975), cited by Barnes. In *Carroll*, the claim asserted was that of interference with a maritime contract. The defendants' land based "blacklisting" activities were designed and directly resulted in the termination of existing employment of seaman on navigable waters. The court stated: "[T]he impact of defendants' alleged actions, at least where existing employment was terminated, was felt in the operations of the affected vessels at sea." *Id.*. at 8.

Here, Barnes does not allege interference with a maritime contract as was alleged in *Carroll*. The Coast Guard's alleged negligence was not designed to terminate Barnes' employment as an operator of vessels. The alleged misrepresentation and failure to follow regulations occurred on February 16, 1990. Barnes continued to operate vessels from that time until December 28, 1994, when he applied for renewal of his license and was advised that it had expired

in 1992. Thus, almost four years passed before the Coast Guard's conduct in 1990 impacted Barnes' ability to operate vessels. The fact that the Coast Guard's conduct ultimately affected Barnes' ability to operate vessels does not necessarily mean that its conduct had an impact on navigable waters. It is not known whether Barnes was actually employed at the time he discovered that his license had expired. Considering these facts, it cannot be said that the Coast Guard's conduct had a direct impact on navigable waters. The court finds that it is without admiralty jurisdiction.

FTCA Jurisdiction

The FTCA provides that the United States can be liable in tort as follows:

> (a) An Action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. § 2675(b).

This Court lacks jurisdiction over Barnes' claims under

the FTCA because he did not wait the entire six-month period before filing this suit. *See* 28 U.S.C. § 2675(a); *Gregory v. Mitchell*, 634 F.2d 199, 203-04 (5th Cir. 1981). Barnes filed this suit 12 days before the six-month period expired. In *Gregory*, the Fifth Circuit specifically held that the six-month period for bringing suit must be satisfied, even where the period subsequently runs after filing suit. The court stated:

> Although Appellants have filed an administrative claim for relief against the FDIC as required by the FTCA, they concede that they did not await the required six month period prior to bringing this action, nor was there the required formal denial. Lacking jurisdiction, the district court was required to dismiss the suit against the United States. Appellants argue that the six month requirement is now meaningless because the period has already run. We cannot accept this proposition. Waivers of sovereign immunity must be strictly construed. Section 2675 is more than a mere statement of procedural niceties. It requires that jurisdiction must exist at the time the complaint is filed.

Id., at 204. (Citations and footnotes omitted). The Fifth Circuit strictly construes the six month period as a jurisdictional requirement, rather than a procedural defect that may be overlooked as a needless formality or corrected by amended pleadings because it is a condition precedent to waiver of sovereign immunity. *See United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980) (the terms of the United States' consent to be sued define the court's jurisdiction to entertain the suit); *U.S. v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1307 (5th Cir. 1987)

(inappropriate to hold a complaint in abeyance until an administrative claim is filed and denied); *Reynolds v. U.S.*, 748 F.2d 291 (5th Cir. 1984) (an amended complaint cannot cure the jurisdictional defect). *See Abernathy v. United States*, 732 F.Supp. 98 (D.Kan. 1990) (discussing the split of authority on this issue.) This court is bound to follow and apply the Fifth Circuit precedent. Under that precedent, this court lacks FTCA jurisdiction.

As there is no subject matter jurisdiction in this case, the court is unable to address the merits of Barnes' remaining claim based on failure to apply its own regulations.[2]

Accordingly,

IT IS ORDERED that the Motion to Dismiss on behalf of the United States of America is GRANTED without prejudice as to the FTCA claim and with prejudice as to the SAA claim.

New Orleans, Louisiana this 25th day of March, 1997.

s/s Henry A. Mentz

UNITED STATES DISTRICT JUDGE

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[2] Barnes concedes, as he must that he has no cause of action for negligent misrepresentation under the FTCA. *Atorie Air, Inc. v. Federal Aviation Admin.*, 942 F.2d 954, 957 (5th Cir. 1991) (section 28 U.S.C. § 2680(h) of the FTCA reserves the tort immunity of the United States for claims of misrepresentation). He maintains however, that he still has a cause of action for the Coast Guard's negligent failure to comply with its own regulations.

APPENDIX D

46 App. § 740

CHAPTER 20—SUITS IN ADMIRALTY BY OR AGAINST VESSELS OR CARGOES OF UNITED STATES

Sec.
743a. Omitted.

§ 741. Exemption of United States vessels and cargoes from arresst or seizure

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall after March 9, 1920, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Canal Commission.

(Mar. 9, 1920, c. 95, § 1,41 Stat. 525; Sept. 26, 1950, c. 1049, §2(a)(2), 64 Stat. 1038; Ssept. 27, 1979, Pub.L. 96-70, § 3(b)(5), 93 Stat. 455.)

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. In case the United States of such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.